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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM.

No. 397.

WILLIAM HOLLIS and SAM GOODMAN, *Appellants*,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN GARDINER, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and the WASHINGTON GAS LIGHT COMPANY, *Appellees*.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

## BRIEF FOR APPELLANTS.

ROSCOE F. WALTER,
*Attorney for Appellants.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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## BRIEF FOR APPELLANTS.

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### STATEMENT OF THE CASE.

This appeal seeks a reversal of the judgment of the Court of Appeals of the District of Columbia which

affirmed a decree of the Supreme Court of the District dismissing appellant's bill in equity seeking to set aside certain orders of the Public Utilities Commission of the District fixing charges for gas furnished to private consumers by the appellee, the Washington Gas Light Company, also seeking refund of amounts paid by appellants for gas used by them pursuant to such orders above the rate alleged by them to be the legal rate.

On May 15, 1919, appellants filed their bill in the Supreme Court of the District of Columbia against appellees, seeking to have set aside two orders of the Public Utilities Commission of March 15, 1918, and March 15, 1919, respectively, the first of which in Formal Case No. 13, order P. U. C. No. 254, advanced the rate to be charged private consumers of gas in the District, from the statutory rate of 75 cents per thousand cubic feet, to 90 cents, and the second, in Formal Case No. 70, order P. U. C. No. 314, which again increased the rate to 95 cents per thousand cubic feet. The bill also asked a refund to appellants of amounts paid by them above the statutory rate with interest from dates of payment, on all gas used by them since the effective date of such orders. The bill also prayed that the appellee Commissioners be required to cause to be made certified transcripts of all proceedings had and the testimony taken in connection with the investigations resulting in the orders complained of, in accordance with paragraph 52 of [redacted] the Public Utilities Act of March 4, 1913 (37 Stats. L., 974), and that appellants have such other and further relief as the nature of the case may require and to the Court may seem meet and proper.

The bill alleged that the legal rate to private consumers of gas in the District of Columbia in effect subsequent to October 1, 1916, and at the times complained of, was that fixed by Section 6 of the Act of Congress of September 1, 1916 (39 Stats. L., 676), namely 75 cents per thousand cubic feet; that the aforesaid order No. 254, of March 15, 1918, advancing the rate to 90 cents, was illegal, discriminatory, unconstitutional and null and void *ab initio*, because not made in accordance with the requirements of [redacted] the Public Utilities Act in that:

(a) Said order attempted to increase the rate to private consumers only and without regard to that charged the United States Government, the District of Columbia, and other consumers of gas in the District not included in the designation "private consumers," the rate to the Governments being permitted to remain at that fixed by the aforesaid Act of September 1, 1916, to-wit: 70 cents per thousand cubic feet.

(b) The provisions of said Utilities Act giving the Utilities Commission the power to regulate and fix reasonable and non-discriminatory rates to be charged by the utilities for their products, services, etc., in the District of Columbia, do not authorize said Commission to increase the rate to private consumers or individuals receiving such product, service, etc., and at the same time not regulate and fix the price to be charged the United States, the District of Columbia, and others not private consumers; but such provisions require that price regulations shall extend to all consumers receiving any product or service at the hand of any public utility in the District,

And unconstitutional in and of itself because

(c) Said order attempted to increase the rate to private consumers of gas in order that the appellee, the Washington Gas Light Company, might receive a reasonable income on the valuation of its properties, sustain its credit, and conduct its business at a reasonable profit on its investment, it appearing, as stated by counsel for said company at the hearing before the Utilities Commission, that the cost of producing gas at the burner amounted to 79½ cents per thousand cubic feet, as estimated for the year 1918, said order thus effecting a discrimination against appellants and depriving them of their property without due process of law by thus requiring them to contribute toward making up the losses which otherwise would have accrued to the Gas Company by reason of its furnishing its product to the Governments and others not private consumers, at a rate below cost of production, and even below the Government statutory rate of 70 cents.

As to the Second order, No. 314, of March 15, 1919, further advancing the rate to private consumers, from 90 to 95 cents per thousand cubic feet, the bill alleged such action of the Utilities Commission to be illegal, unduly discriminatory, confiscatory, unconstitutional and null and void, *ab initio,* for the reasons above stated as to order No. 254 and for the further reason, as appeared at the hearing before the Utilities Commission, that if the private consumer of gas had paid 90 cents per thousand cubic feet for the entire year of 1918, and had the Governments paid the same rate during such period, the Gas Company would have made expenses and received a return of approximately

6 per cent on its investment. It also appeared as alleged in the bill as follows:

(1) The total sales for the first nine months of the year 1918, in the District of Columbia, for United States buildings, municipal purposes, park lamps and street lamps, amounted to 187,844,000 cubic feet, the average price for which was 52.15 cents per thousand.

(2) The total sales to other companies in theDistrict amounted to 168,592,000 cubic feet, the average price for which was 51.32 cents per thousand.

(3) The total sales in the District for said period, including those to private consumers, amounted to 2,908,701,000 cubic feet.

Also, as to the second order the bill alleged the same to be illegal *ab initio* for the further reason that it was not made in accordance with the requirements of paragraph 94 of the Utilities Act of March 4, 1913, aforesaid, in that in the conduct of the investigation resulting in the order complained of, the statutory notice to one of the parties who had entered an appearance therein, was not given, thus depriving him and the persons he represented of an opportunity to be heard.

Paragraph 3 of the bill as originally filed, alleged that suit was brought under and by virtue of paragraph 64 [redacted] of the Utilities Act. On July 8, 1919, leave of the court first having been obtained, the bill was amended by substituting in lieu of the original paragraph 3 of the bill the following allegation of jurisdiction:

> (3) That said plaintiffs, William Hollis and Sam Goodman, institute this their bill in equity both because they are without adequate remedy at law, and because paragraph 64 of Section 8 of

said Act of March 4, 1913, creating the Public Utilities Commission of the District of Columbia, expressly provides that any person interested and being dissatisfied with any order or decision of said Commission fixing any rate or rates, tolls or charges, may commence a proceeding in equity in this honourable court against the said Commission to vacate or set aside any such decision or order, on the ground that such rate or rates, tolls or charges complained of fixed in such order is unlawful or unreasonable.

On May 29, 1919, the Utilities Commission moved to dismiss appellants' original bill on the following grounds:

(1) That the plaintiffs have not by said bill set forth facts upon which they are entitled to the relief prayed therein.

(2) That the plaintiffs were not parties to the proceedings before the Public Utilities Commission set forth in said bill either formally or by reason of any complaint filed by them before said Commission in said proceeding and are not interested parties within the meaning of paragraph 64 of the Public Utilities Law of the District of Columbia and as such entitled to institute an action to vacate, set aside or modify the orders passed by it as set forth in the bill of complaint.

On June 3, 1919, the appellee, The Washington Gas Light Company, moved to dismiss the original bill on the two grounds above stated and on the three following additional grounds, to-wit:

(3.) That the plaintiff's bill was not filed within one hundred and twenty days after the entry or rendition of the order or determination of March

15, 1918, in Formal Case No. 13, as required by paragraph 65, Section 8, of the Act of Congress, approved March 4, 1913, known as "Public Utilities Act," which gives the right of appeal from the order or determination of the Public Utilities Commission for a period only of one hundred and twenty days after such entry or rendition thereof.

4. That the plaintiffs have not exhausted that remedy before the Public Utilities Commission.

5. That the bill is multifarious.

On July 8, 1919, the defendants moved to dismiss the bill *as amended*, on the same ground, above set out, and the court after hearing argument and considering briefs, on the same day sustained defendants' motion, ruling as follows:

1. I think the first ground is well taken.

2. I think the plaintiff's are entitled to bring suit under paragraph 64 of the Act.

3. I think the 3rd ground is well taken.

4. I do not think the 4th ground is well taken.

5. I do not think the 5th ground is well taken.

From the action of the Supreme Court of the District in dismissing the plaintiffs bill they appealed to the Court of Appeals of the District, making the following assignments of error:

1st. The Court erred in holding that the plaintiffs have not in their amended bill of complaint set forth facts entitling them to the relief prayed for.

2nd. The Court erred in holding that the plaintiffs' right of action sought to be enforced in their amended bill is barred by the statute of limitations as provided in paragraph 65 of Section 8 of the Act of Congress of March 4, 1913, known as the "Public Utilities Act."

3rd. The Court erred in sustaining the motion of the defendants, filed July 8, 1919, to dismiss plaintiffs' amended bill.

On April 5, 1920, the Court of Appeals of the District affirmed the judgment of the Supreme Court, with costs, holding that the appellants are not "persons interested" within the meaning of that term as used in paragraph 64 of the Public Utilities Act, and that the equitable proceeding contemplated by said paragraph is in the nature of an appeal rather than an original suit.

To the action of the Court of Appeals in affirming the decree of dismissal, the following assignments of error are represented to this Court, Rec., p. 34.

ASSIGNMENTS OF ERROR.

(a) In affirming the decree of the Supreme Court of the District of Columbia, which dismissed the plaintiffs' amended bill of complaint.

(b) In finding that the appellants, plaintiffs in the Supreme Court of the District of Columbia, are not persons interested within the meaning of that term as used in paragraph 2 of paragraph 64 of the Public Utilities Law, Section 8 of the Act Making Appropriations to provide for the Expenses of the Government of the District of Columbia for the Fiscal Year Ending June 30, 1914, and for Other Purposes, approved March 4, 1913.

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(c) In finding that the equitable proceeding in the Supreme Court of the District of Columbia contemplated by paragraph 64 of Section 8 of said Act of March 4, 1913, is in the nature of an appeal rather than an original suit.

(d) In affirming the decree of the Supreme Court of the District of Columbia, and which denied to the appellants the relief sought by their amended bill of complaint.

## ARGUMENT.

The decision of the Court of Appeals appears in the record, pages 28-30. It will be seen from a consideration of this opinion that the affirmance of the decree of the Supreme Court of the District dismissing appellants' bill is based on grounds which the latter court held not to be tenable. In other words, the Supreme Court found that appellants are interested parties within the meaning of paragraph 64 of the Utilities Act and as such were entitled to bring suit to set aside the orders complained of.

The Court of Appeals holds that before appellants had a right to file suit in the Supreme Court it was first necessary for them to have gone before the Utilities Commission and engage in the proceeding of again presenting to that body the very matters that it had already considered when the applications for increased rates were made by the appellee gas company in formal cases numbers 13 and 70. In this holding it is respectfully submitted the Court of Appeals erred.

That Court in setting out in its opinion the various provisions of the act under which proceedings before the Utilities Commission may be instituted failed to include the following provisions, namely:

Par. 40: That any public utility may make complaint as to any matter affecting its own product or service with like effect as though made by the commission or upon reasonable complaint as hereinbefore provided.

Par. 94. * * * third, any public utility desiring to advance or discontinue any such rate or rates may make application to the commission in writing, stating the advance in or discontinuance of the rate or rates desired, giving the reasons for such advance or discontinuance; fourth, upon receiving such application the commission shall fix a time and place for hearing, and give such notice to interested parties as shall be proper and reasonable; if after such hearing and investigation, the commission shall find that the change or discontinuance applied for is reasonable, fair, and just, it shall grant the application, either in whole or in part; fifth, any public utility being dissatisfied with any order of the Commission made under the provisions of this paragraph may commence a proceeding against it in the Supreme Court of the District of Columbia *in the manner as in this section hereinbefore provided, which action shall be tried and determined in the same manner as is in this section hereinbefore provided.* (Italics ours.)

The italicized words refer to the provisions of Par. 64 of the Utilities Act quoted in the opinion of the Court of Appeals, which are as follows:

That any public utility and any person or corporation interested being dissatisfied with any order or decision of the commission fixing any valuation, rate or rates, tolls, charges, schedules, joint rate or rates or regulations, requirement, act, service or other thing complained of may commence a proceeding in equity in the Supreme

> Court of the District of Columbia against the commission, as defendants, to vacate, set aside, or modify any such decision or order on the ground that the valuation, rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service, or other thing complained of fixed in such order is unlawful, inadequate or or unreasonable.

It was in pursuance of the above provisions, paragraphs 40 and 94 of the Utilities Act, and which paragraphs, as above noted, were not quoted in the opinion of the Court of Appeals, that the appellee gas company made its applications in formal cases 13 and 70, for the increased rates sought, and which resulted in orders P. U. C. 254 and 314, made the bases of appellants' complaint. In the face of this fact the Court of Appeals affirmed the dismissal of the bill because, as it said:

> In any event, however, formal complaint must be filed, hearing had, and a final order obtained from the Commission, before the jurisdiction of the courts can be invoked.

Appellants' bill alleged these very prerequisite conditions. The demands of the statute in this respect were met in the filing with the Utilities Commission by the gas company, of the two applications for increased rates and by the subsequent hearings, findings, and orders in the respective formal cases numbers 13 and 70. Then, as provided in Par. 64 of the Act, appellants, being interested parties and dissatisfied with said orders of the Commission, made pursuant to the applications of the gas company, filed their bill in the instant case, seeking to have such or-

ders vacated and set aside on the grounds that they were not made in accordance with the requirements of the Act creating the Commission, and that the facts alleged, on their face, show the orders to be illegal, discriminatory, and confiscatory as against the appellants.

The conclusion of the Court of Appeals that before resort can be had to the courts the same matters must again be presented to the Utilities Commission, can not be upheld. Particularly is this true for the additional reason that the questions presented are justiciable. They are purely questions of law. They are questions for the consideration of a court of competent jurisdiction, which in the instant case, by reason of the specific provisions of the Utilities Act itself, is the Supreme Court of the District of Columbia.

The powers and duties of the Utilities Commission are analogous to those of the Interstate Commerce Commission, and any order of either administrative body which is made in disregard of the requirements of the law or which deprives any person or corporation of rights or property guaranteed under the Constitution is reviewable by the courts.

As was said by this Court in *Int. Com Com.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 92:

> Whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power.

Therefore, where an administrative body such as the Utilities Commission or the Interstate Commerce Commission, exceeds its statutory power, an order

made pursuant to such action may be enjoined by a court of competent jurisdiction, even though the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562, citing *Int. Com. Com.* v. *Diffenbaugh,* 222 U. S. 42, 49; *Louisiana & Pacific Ry. Co.* v. *United States,* 209 Fed. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Int. Com. Com.,* 194 Fed. 449, 451.

The case of *F. H. Peavey & Co.* v. *Union Pacific R. Co.,* 176 Fed. 409, is conclusive against the appellees and the judgment of the Court of Appeals in the case at bar. In that case there was a demurrer to the bill of a certain Diffenbaugh and his associates on the ground that they as complainants were not parties to the proceedings before the Interstate Commerce Commission, upon which the order of that Commission was based. The Circuit Court of the United States for the Western District of Missouri, speaking through Sanborn, C. J., said, p. 417:

> A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. *The proceeding in the court is not an appeal;* it is a plenary suit in equity. The jurisdiction to hear and determine such suits is vested in the Circuit Courts. Section 16, as amended (34 Stat. 592, U. S. Comp. St. Supp. 1909, p. 1162). The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger

> of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief. * * * The complainants in the Diffenbaugh case are entitled to challenge the order of the Commission in this court. The allegations in their bill that this order was beyond the power of the Commission and will irreparably injure their property and their business present good ground for equitable relief, and the demurrer of the Commission must be overruled.

This court, in affirming the decision of the Circuit Court on the question of jurisdiction in the case from which the above conclusion is quoted, in *Int. Com. Com.* v. *Diffenbaugh,* 222 U. S. 42, 49, said:

> The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point, as it wishes a final decision. We are content to leave that matter on the statement of the court below, 176 Fed. 416, 417. The plaintiffs are affected by the order and it is just that they should have a chance to be heard although not parties before the Commission.

Paragraph 64 of the Utilities Act provides that *any person interested* and dissatisfied with *any order may commence* a proceeding in equity in the Supreme Court of the District.

The appellants were such parties. As said in the *Diffenbaugh case,* their proceeding is not an appeal. As decided by the Supreme Court of the District (the dismissal of the bill by that Court being on other grounds), "The plaintiffs are entitled to bring suit under paragraph 64 of the Public Utilities Act." They are interested parties, as is shown by the facts alleged in their bill. In *Fitch* v. *Board of Sup'rs.,* 54

Pac. 901, the term "party interested" was defined as follows:

> The "party interested, who is thus authorized to invoke peremptory power to compel the board to pass an ordinance fixing the water rates, is a party who has an interest in having the rates fixed, and who would be injuriously affected if they were not fixed.

It is therefore submitted that since the orders complained of were made pursuant to applications of the gas company to the Commission for increased rates; that appellants' bill is based on the illegality of such orders arising by reason of the Commission's action in the matter being not in accordance with the requirements of the Utilities Act; that the facts alleged show the orders to be illegal, unduly discriminatory and confiscatory; that the relief sought is of a nature such as can be obtained only from a court of equity; that the Utilities Act itself provides that any person interested being dissatisfied with any order of the Commission may commence a proceeding in equity in the Supreme Court of the District; and that the appellants' amended bill was filed pursuant to the last stated provision, and on the further ground that they were without an adequate remedy at law, such bill, it is respectfully submitted, was properly filed in the Supreme Court of the District, and that such body was the only forum which could assume jurisdiction of the matter complained of.

It therefore follows that the Supreme Court of the District had jurisdiction and that the Court of Appeals erred in affirming the decree of dismissal on the ground made the basis of the latter court's conclusion.

*The orders involved, Nos. 254 and 314, Increasing the Rates to be Charged Private Consumers, from the Statutory Rate of 75 cents to 90 cents, and Therefrom to 95 cents per 1,000 cubic feet of Gas, are Invalid, Because not Made in Accordance with the Requirements of the Public Utilities Act, and Because the Rates Fixed by Such Orders Are Unreasonable, Discriminatory and Confiscatory, as Alleged in the Bill.*

No written opinion stating the reasons sustaining the motion to dismiss was filed by the trial court. Although not appearing in the record, his Honor remarked, when the motion was allowed, that he did not believe that the Public Utilities Commission possessed the power to fix a rate to the United States and District Governments for gas furnished them in the District of Columbia.

Appellants' contention is that the Utilities Commission has such power, and that in the exercise of its function as a rate making body, circumscribed by the statutory restrictions that all rates shall be reasonable, just and non-discriminatory, it shall prescribe such a rate not only to the private consumer, but to all consumers of gas in the District of Columbia.

To hold that the Act does not give the Commission such power is to put such a construction on the law as will defeat one of the chief purposes of its enactment.

In the determination of reasonable and non-discriminatory rates, such rates must be arrived at with regard being had to those charged all consumers of the product in the District. Paragraph 2 of the Act renders unlawful the charge by any public utility of a discriminatory rate. Paragraphs 38 to 42, 44, 45 and 88, give to the Commission the power to investigate

and relieve against any unjust discrimination. It is respectfully submitted that Congress, when it conferred upon the Commission this power, contemplated that it should exercise it completely and without being hampered with the condition that a rate to some of the consumers would be fixed at a certain inflexible figure, as appellees contend in this case, and at a price far below the cost of production. Especially is this true when the consumers having the benefit of such low rate are very material users of the product, and so much so that, as alleged in the bill, had the Governments during the year 1919 paid the private consumers' rate of 90 cents, the Gas Company would have earned above all costs of operation, 6 per cent on its investment. And, of course, it follows that any increase in the amount of gas furnished to the Governments at a fixed rate below the cost of production, adds to the burden of the private consumers if the rate to the latter must be made sufficiently high that it will guarantee to the producer a reasonable income on its investment.

The requirements of the Utilities Act with respect to rates and charges for products and service furnished by the various utilities subject to the Act are as follows:

> Par. 2. * * * The charge made by any such public utility for any facility or services furnished, rendered, or to be furnished or rendered, shall be reasonable, just and non-discriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by this section.

Par. 24. That every public utility shall file with the commission, within a time fixed by the commission, schedules, which shall be open to public inspection, showing all rates, tolls, and charges which it has established and which are in force at the time for any service performed by it in the District of Columbia, or for any service in connection therewith or performed by any public utility controlled or operated by it. The rates, tolls, and charges shown on such schedules shall not exceed the rates, tolls, and charges now allowed by law, and shall be the lawful rates, tolls, and charges within the District of Columbia, and shall remain and be in force until set aside by the commission.

Par. 30. That it shall be unlawful for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it within the District of Columbia, or for any service in connection therewith, than is specified in such printed schedules * * * as may at the time be in force, or to demand, collect, or receive any rate, toll, or charge not specified in such schedules. The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges until the same are changed as provided in this section.

Par. 81. That if any public utility or any agent or officer thereof shall, directly or indirectly, by any device whatsoever, or otherwise, charge, demand, collect, or receive from any person, firm, or corporation a greater or less compensation for any service rendered or to be rendered by it in or affecting or relating to the conduct of a * * * gas plant, gas corporation, * * * or for any service in connection therewith than that prescribed in the public schedules or tariffs then in force or established as provided herein, or than

it charges, demands, collects, or receives from any other person, firm, or corporation other than one conducting a like business for a like and contemporaneous service, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be a misdemeanor and unlawful, etc.

Par. 88. That whenever, after hearing and investigation as provided in this section, the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in this section.

That the power of the Commission to relieve against all unreasonable or discriminatory rates is complete can not be doubted in view of the above provisions, and those of paragraph 41 of the Act, which are as follows:

Par. 41. That if upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this section, the Commission shall have power to determine and by order fix and order to be substituted therefor such rates or rates, tolls, charges, or schedules as shall be just and reasonable. If upon such investigation it shall be found that any regulation, time schedule, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this section, or if it be found that reasonable service is not supplied, the Commission shall have power to

> determine and substitute therefor such other regulations, time schedules, service or acts and to make such orders respecting and such changes in such regulations, time schedules, service or acts, as shall be just and reasonable.

In the case of *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 355, 356, this court in construing Section 3 of the Act to Regulate Commerce, and in holding that the power of the Interstate Commerce Commission in the matter of removing discriminations extends to a regulation of an intrastate rate, under an authority no broader in scope, we submit, than that given the Utilities Commission in the paragraph of the Act last quoted, said:

> Section 3 of the Act to Regulate Commerce provides (February 4, 1887, c. 104, 24 Stat. 379, 380):
>
> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, or corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or advantage in any respect whatsoever."
>
> This language is certainly sweeping enough to embrace all of the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the Act that the evil of discrimination was the principal thing aimed at, and there is no

basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach.

It clearly appears from the wording and from the intent of the various paragraphs of the Utilities Act that Congress contemplated that the Utilities Commission, after being fully advised as to all matters and circumstances affecting rates to be charged by the various utilities in the District, should have, and thereby would have the power to fix reasonable and non-discriminatory rates, and when occasion should arise for the determination of such rates, whether on the initiation of the Commission itself, on complaint of a patron of one of the utilities, or on application of the utility, the duty is incumbent on the Commission to find, and require by its order a reasonable and non-discriminatory rate or rates to be charged *all* parties receiving the product or service from any such utility.

There is no provision of the Act which by wording or implication restricts the fixing of rates by the Commission on products or service furnished to private consumers only. To thus restrict the power of the Commission would necessitate reading into the statute an exception in violation of one of the well recognized rules of construction of this court. *Employers' Liability Cases,* 207 U. S. 463, 500. Not only would such a construction require reading something into the law, but in addition to disregarding the rule that all rates fixed by the Commission shall be non-discriminatory, it would also necessitate a disregard of the plain requirements of paragraph 24 of the Utilities Act, which provides that the utilities shall file with the Commission schedules of *all* rates for *any* service and which

rates shall be the lawful rates until set aside by the Commission; of paragraph 30, which provides that it shall be unlawful for any utility to charge a greater rate for *any* service in the District than that specified in such schedules, such rates being the legal rates until changed as provided in the Act; of paragraph 81, which provides that any public utility or officers thereof charging or collecting from *any* person, firm or corporation a greater or less compensation for *any* service than prescribed in such schedules or than it charges or collects from *any* other person, firm or corporation, except those engaged in like business, shall be deemed guilty of unlawful discrimination and subject to the penalties therein provided; of paragraphs 38 to 41 inclusive, which provide that on its own initiation or complaint of any utility that *any* rate is unreasonable or unjustly discriminatory, the Commission may after hearing fix and determine reasonable and non-discriminatory rates; of paragraphs 44 to 46, inclusive, which provide that whenever the Commission believes *any* rate may be unreasonable or unjustly discriminatory it may summarily investigate and fix reasonable and non-discriminatory rates; of paragraph 88 which provides that whenever after an investigation it finds *any* rate or charge to be unreasonable or discriminatory the Commission may regulate and fix the same; and of paragraph 94, which provides that unless the Commission shall otherwise order it shall be unlawful for any utility to charge a greater compensation for *any* service in the District than that fixed on the lowest scheduled rate in effect on the date of the passage of the Act and that every utility within 30 days therefrom shall file with the Commission copies of *all* schedules of rates in force

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on that date and that any utility desiring to change *any* such rate shall apply therefor to the Commission for relief. As to the inclusiveness of these provisions by reason of the use of the words "any" and "all," attention is called to the case of *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467, 479.

That the appellee gas company recognized that these provisions contemplated their filing [redacted] of rates charged for gas furnished the Governments is evidenced by the fact that such schedules were filed in accordance with the requirements of the Act.

*Until Recently the Gas Company, Through Its Counsel, Contended for the Proposition Herein Urged by Appellants, Namely, That the Commission Possesses the Power and has Imposed Upon it the Duty to Fix Rates to Be Charged the General and District Governments.*

In the Act of September 1, 1916, which fixed the 70-cent rate to the Governments and the 75-cent rate to private consumers, it is provided as follows:

> Sec. 6. That hereafter no part of any money appropriated by this or any other Act shall be used for the payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by said companies for use in any of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per thousand cubic feet.
>
> On and after the first day of October, nineteen hundred and sixteen, the Washington Gas Light Company shall not charge or collect for gas furnished a private consumer in any part of the District of Columbia a rate in excess of 75 cents per thousand cubic feet of gas so furnished: *Provided*, that if a consumer of gas other than the

> Government or the District of Columbia shall not pay monthly any gas bill within ten days after the same shall have been presented, said gas company may charge and collect from any such consumer so failing to pay said gas bill as aforesaid 10 cents additional for each one thousand cubic feet of gas represented by said bill: *And provided* further, that nothing herein contained shall be construed as limiting or taking away any of the powers now vested by law in the Public Utilities Commission of the District of Columbia.
>
> That from and after October first, nineteen hundred and sixteen, the Georgetown Gas Light Company shall not be permitted to charge or collect more than 85 cents per thousand cubic feet for gas for cooking, illuminating or other purposes.

The history of the legislation resulting in the Act of Congress just quoted shows that Section 6 as proposed originally consisted only of the first paragraph of the law as above set out, and contained no provision for the Utilities Commission still retaining the powers granted under the Utilities Act of 1913. The bill as thus presented, was opposed by the appellee gas company through its counsel, Mr. Darlington, for the reasons appearing on page 336 of the Hearings Before the Subcommittee of the Committe on Appropriations, United States Senate, June 23, 1916, incorporated into the proceedings of the Senate, as in Committee of the Whole, beginning page 11943, Cong. Rec., of Aug. 2, 1916, as follows:

> Mr. Darlington's statement: Mr. Chairman, on behalf of the Washington Gas Light Company, we would like to submit some considerations in respect to Section 6 of the Act.

That provides that no part of any money appropriated by this or any act shall be used for payment to the Washington Gas Light Company for any gas furnished by them for the use of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per thousand cubic feet.

We have three objections to that section: *The first is that the Public Utilities Act reposes in that Commission the power and duty of fixing uniform rates, and we would think it ought to be left to that Commission to do that.*

Also at the hearing before the Commission in formal case No. 13, on December 18, 1917, pp. 34 and 35 of the record, in reply to questions of Corporation Counsel, Mr. Syme, as follows:

Mr. Syme: May I ask you one question, Mr. Darlington? The Act of Congress which Commissioner Gardiner has read, fixes the price of gas for private consumers, I think in Washington, at 75 cents and the price of gas to the District of Columbia and to the United States Government at 70 cents. Do you think it is in the power of the Public Utilities Commission to fix the price of gas for the Government and for the District of Columbia?

Mr. Darlington: May I answer that by another question?

Mr. Syme: Yes.

Mr. Darlington: Does the Corporation Counsel consider that it was in the province of the Public Utilities Commission to fix the price of Government gas before this 75-cent price was established?

Mr. Syme: I am not in position to answer that.

Mr. Darlington: If you had it before, you have it now; if you had not, you have not now.

Mr. Syme: Do you think we had the right to interfere with the price of the service of any public utility to the Government or the District of Columbia, or do you think it was simply to determine whether or not the private consumers were being served at a reasonable rate?

Mr. Darlington: I am free to say that the power of the Commission to fix the price the Government shall pay is one I have not considered.

Further it was developed at the same hearing that *the petition for a rate increase was filed on the theory that relief was expected from the Commission by its increasing the rate both to the Governments and to the private consumers,* as appears from pages 36 and 37 of the record of the same hearing on December 18, 1917, which is as follows:

Mr. Syme: I want to ask Mr. Minor if in the calculation of $1.10 (the price sought to have the Commission establish) and the return from it you calculate upon the gross amount of gas you are furnishing both to the Government and to the private consumer?

Mr. Minor: Yes.

Mr. Syme: And did you calculate then that we would have to increase the price both to the Government and the District?

Mr. Darlington: *Of course, the answer is "yes."* If you find the increase is necessary and you can not charge the Government at the increased rate, you will have to go somewhere else. If you find it is necessary to make the increase in order to enable this utility to supply the Government with gas and find that you can not get any part of the increase from the Government, then you will have to fall back on the private consumer.

Mr. Minor: We are not likely to get this $1.10 rate out of the Government, because they have

> not appropriation enough. We think it is fair the Government should pay this with the private consumer.

Up until this time it appears from the history of the entire matter that counsel for the Gas Company took the view that the Commission possessed the power to fix Government rates and that in justice to all concerned that is what *should* be done.

But for some reason known to the appellee Gas Company, a change of attitude suddenly came upon them, for on February 16, 1918, at the argument on the first application for the increased rate, as appears from page 427 of the record for that date, Mr. Darlington took a contrary view of the legal question and expressed his view to the Commission as follows:

> Mr. Darlington: Another question suggested was whether or not this Commission had power to regulate or fix the prices paid by the Government. I was asked that question at an earlier hearing, and was not then prepared to answer. Reflection convinces me that the Commission has not that power. What the Government shall pay is fixed by its appropriation acts.

Mr. Darlington's statement that reflection convinces him that the Commission does not possess the power of fixing the Government rate is not explained, but his conclusion is clearly inconsistent with his former theory so strongly urged before the Senate Committee, that Congress should not fix a rate to the Government because the Utilities Commission is working toward that end, and his subsequent admission before the Commission that all the powers it possessed before the amendment of 1916, it still retains by reason of the

saving proviso in that Act. This action of the attorney for the Gas Company is most remindful of the statement made by Senator Norris before the Senate as in Committee of the Whole, when the question of fixing the Government rate was before it August 2, 1916, 64th Congress, third session, Cong. Rec. p. 11972, at which time the Senator from Nebraska, in referring to counsel of the Gas Company, said: "These same attorneys who are here questioning the jurisdiction of Congress will be there questioning the jurisdiction of the Public Utilities Commission."

But, aside from this, it is submitted that any imaginary ground for contending that the Commission has not the power to fix a Government rate is entirely swept away when the history of Section 6 of the Act of September 1, 1916, is given due consideration.

*The History of the Legislation Resulting in Section 6 of the Act of September 1, 1916, Conclusively Shows That the Commission Possesses the Power to Fix a Government Rate.*

In brief its history is as follows: That section as passed by the House and originally introduced in the Senate, as before stated, consisted only of the first paragraph of the present law, and which proposed the fixing of a 70 cent rate to the General and District Governments. When the bill (H. R. 15774) came before the Senate Committee, of which Senator Gallinger was Chairman, and of which Senator Smith of Maryland was also a member, Section 6 was stricken out, as appears from the report of that Committee, No. 669, of July 14, 1916. On August 2, 1916, the Senate, as in Committee of the Whole, took occasion

again to consider the amendment. The proceedings in relation thereto, before a vote was had on retaining the amendment, and subsequent thereto, when a substitute amendment was adopted and the rejected provision reinstated (Cong. Rec. 64th Congress, 1st Session, pp. 11971-72, 11978-80), will not be recounted in full, but references will be made to certain statements of members of the Senate Committee which conclusively show the reason why the original Section 6 standing by itself was rejected, and which throws light on the meaning of the bill as finally enacted.

In response to the following statement of Senator Norris of Nebraska:

> The Senate Committee this time, for some reason, has seen fit to strike that provision (original Section 6) out of the bill; and that is the amendment that I reserved for a separate vote. I have heard no reason why that should be done.

Mr. Dillingham of the Committee explained as follows:

> If the Senator will allow me, I will call his attention to a statement before the Committee by Mr. Darlington, I suppose counsel for the Company, a very eminent lawyer—I presume the Senator knows him—in which, on page 336 he states very clearly the reasons why it should go out.

Then ensued the following colloquy:

> Mr. Norris: Will the Senator read them? Or give the volume to me and I will read them. (Mr. Dillingham handed the volume of hearings to Mr. Norris.)
>
> Mr. President, in order that the Senate may have the benefit of it—I have not read this yet—I will read it. Mr. Darlington's statement:

Mr. Chairman, on behalf of the Washington Gas Light Company we would like to submit some considerations in respect to Section 6 of the Act.

That is one that the Senate Committee strikes out.

That provides that no part of any money appropriated by this or any other Act shall be used for payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by them for the use of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per thousand cubic feet.

We have three objections to that section. The first is that the Public Utilities Commission Act reposes in that Commission the power and duty of fixing uniform rates, and we would think it ought to be left to that Commission to do that.

* * * The representatives of this Company appear before the Committee and object to this rate because they say that the Public Utilities Commission has jurisdiction. * * *

Now, take the next objection, and I am taking them up without having read them before. I have not read this one yet.

In the second place, the same public utilities act in paragraph 81 makes it a misdemeanor for the officers of these companies to furnish any person, firm or corporation gas at a greater or less compensation than others. So it creates a question whether this would not lower the rate to everybody to 70 cents per thousand cubic feet.

Now let us take the third objection:

In the third place, this identical provision, or one to the same effect, was passed by the House in connection with the legislative bill, was con-

sidered by the Senate Committee, and the Commissioners were interrogated about it. I read from page 10 of the hearing on the legislative bill.

"Senator Overman: How are you getting on with the gas company? Have you reached a conclusion?"

"Commissioner Kutz: No, sir, but we expect to reach a finding as to valuation within three months, and by the first of July we anticipate that we will be able to present the valuation of our experts to the companies for a hearing to determine the 'fair value' of the property of the companies."

"Senator Smoot: Let me ask you if this provision in the House bill"—*that is the one fixing it at 70 cents for public buildings*—"in any way conflicts with the public utilities law passed by Congress? Does it conflict with paragraphs 81 and 38 and 41?"

Those are the ones that make it a misdemeanor to make any discrimination to any person in the price of gas.

"Commissioner Kutz: *In a sense it does, in that it apparently takes away from the utilities commission a power that Congress has lodged in that Commission; and I feel that the Commission's hands would be tied with respect to that kind of service if, subsequent to the passage of the law, Congress fixed a price for a particular use.*"

* * * * *

"Senator Overman: Your idea is that it would be better to wait and let the Public Utilities Commission fix it?"

"Commissioner Kutz: *Yes, sir; that it would be much better to wait.*"

Without reading further, the Senate Committee

sustained that view, the provision was stricken out of the House bill and the conferees acceded to it. This is a proposition to reintroduce it, not only as to the District, but in other acts in which it has been expressly excluded. On these three grounds we think this particular section ought to be eliminated from the bill.

Senator Smith of Maryland: Has there been any investigation by the Public Utilities Commission to ascertain what is a fair price?

Mr. Darlington: Yes, sir.

* * * * *

Senator Gallinger: After which time, if that finding is accepted and litigation does not ensue, the Public Utilities Commission will proceed upon that basis to determine what a fair rate is.

Mr. Reeside: To fix the rate.

Mr. Darlington: *And even if litigation does ensue the Public Utilities Commission Act provides that the rate fixed by the Commission shall be in force until the court disturbs it.*

* * * * *

Mr. Smith of Maryland: Mr. President, the Utilities Commission has been appointed for the purpose of determining the price that the people should pay this city, but there is a Utilities Commission appointed for that purpose. They have every means in their possession for determining what is right between the utility corporations and the people, and we felt that it was not our duty to determine what gas should be sold for in the District of Columbia until that valuation should be made.

In fact, so far as I am concerned, I do not feel that it is incumbent upon me to determine what the value of gas is in this city, *but there is a Utilities Commission appointed for that purpose with*

*all the authority needed to get all the information that it is possible upon the subject and to determine it. We felt that for the present it was better to leave it until they had an opportunity to determine it, to put it over until they would be in a position to determine what should be charged. That is the reason which moved your committee to determine as it did to leave it over until the Public Utilities Commission could determine it for themselves.*

The Presiding Officer: The question is on concurring in the amendment.

The result was announced yeas 17, nays 32.

So the amendment was nonconcurred in.

Mr. Norris: I offer the amendment which I send to the desk.

The Presiding Officer: The amendment will be stated.

The Secretary: On page 119 it is proposed to strike out Section 6 and in lieu thereof to insert the following:

Sec. 6. On and after the first day of October, 1916, the Washington Gas Light Company shall not charge or collect for gas furnished a consumer in any part of the District of Columbia a rate in excess of 75 cents per 1,000 cubic feet of gas so furnished: *Provided*, That if a consumer of gas other than the Government or the District of Columbia shall not pay monthly any gas bill within 10 days after the same shall have been presented, said gas company may charge and collect from any such consumer so failing to pay said gas bill as aforesaid 10 cents additional for each 1,000 cubic feet of gas represented by said bill: *And provided further, that nothing contained herein shall be construed as limiting or taking away any of the powers now vested by law in the*

*Public Utilities Commission of the District of Columbia.*

* * * * *

Mr. Norris: Mr. President, the Senate has just decided on a roll-call vote that the provision shall remain in the bill limiting the price of gas to 70 cents to the Government. That provision was originally put in after the Public Utilities Commission Act passed, as I have before called to the attention of the Senate. *The amendment that I have suggested, specifically provided that it shall not interfere with the Public Utility Commission.* There is not any doubt, however, that when the Public Utility Commission gets through with their investigation they will fix the price at a lower rate than is fixed in the amendment. There cannot be any possible doubt of that when we take into consideration the fact that the company is paying 24 per cent dividends, and at the rate fixed if they sold the same amount of gas, from their own figures, they would have paid 15½ per cent dividend on their entire capital stock, one-half of which is water. Now, Mr. President, I desire to modify my amendment. *Instead of striking out Section 6,* I desire to have the amendment *follow* line 22 on page 119, and I desire to put in the word "private" after the article "a" and before the word "consumer," so that it will read: (Italics ours.)

and here follow the words of the bill exactly as finally enacted into the present law heretofore set out.

When it is borne in mind that the original Section 6 related only to the fixing of a government rate, and that the Senate declined to adopt it until the amendment reserving all powers theretofore granted to the

Utilities Commission was made a part of the Amendment, there can be no doubt of the proposition that the Act of 1916 still retains to the Commission the *power* to fix the Government rate and imposes upon it the *duty* to determine and fix such rate, in just the same respect and to the same extent that the power is still reserved to determine and fix a rate to be charged to the private consumers.

*The Action of the Commission in Fixing the 90 and 95 Cent Rates to the Private Consumers Without at the Same Time Determining and Fixing a Reasonable Rate to the Governments, and, of course, Without Regard to Such Government Rate, Was Beyond the Authority of the Commission and Illegal.*

As sustaining this conclusion we cite the case of *Southern Pacific* v. *Interstate Comm. Comm.*, 219 U. S. 433, wherein the Court said, quoting from pages 441 and 444:

> It was alleged that the Commission, in setting aside the increased rate of $5 and fixing substantially the old rate, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered but had proceeded upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best under the circumstances, for the interest of shippers.
>
> * * * * * * * * *

> It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is, What was the nature and character of the order made by the Commission? That is, What, in substance, was the power which the Commission exerted in making the order?
>
> Coming to the consideration of that subject, we are of the opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests.

In the instant case the same conclusion must follow for the reason that the orders here attacked were made in consequence of the assumption by the Utilities Commission that it possessed the power to fix a gas rate to private consumers without regard to other consumers in the District of Columbia and in absolute disregard of the requirements of the Utilities Act that all rates shall be reasonable and non-discriminatory, and in consequence of the further assumption that it did not possess the power to determine and fix rates to the General and District Governments and others not private consumers.

*The Appellants' Rights are not Barred by Paragraph 65 of the Public Utilities Act.*

This paragraph provides as follows:

> That every proceeding, action or suit to set aside, vacate, or amend any determination, or or-

> der of the Commission, or to enjoin the enforcement thereof, or to prevent in any way such order or determination from becoming effective shall be commenced and every appeal to the courts or right of recourse to the courts shall be taken or exercised, within one hundred and twenty days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit, or to take or exercise any such appeal or right of recourse to the courts, shall terminate absolutely at the end of such one hundred and twenty days.

Attention of the Court is here directed to the fact that the defense based on the statute of limitations relates only to the first order of the Commission, and not to the order increasing the rate prescribed in that order to 95 cents, for the reason, as appears in the Bill, that the latter order was issued on March 15, 1919, and the Bill was filed on May 15, 1919.

The limitation of 120 days is not one against an action to enjoin the enforcement of a rate illegal in and of itself such as, we submit, has been shown to be true as to the rates prescribed in both of the orders made the basis of the appellants' complaint. The Bill, in addition to stating facts that show the first order to be unconstitutional and void and praying to have said order vacated and set aside, also prays as follows:

> That the defendant, the Washington Gas Light Company be perpetually enjoined from charging for its gas furnished to private consumers in the District of Columbia any price in excess of that provided in the aforesaid Act of Congress of September 1, 1916, to-wit: 75 cents per thousand cubic feet.

There is nothing in the statute precluding a bill to enjoin any utility from charging an unlawful rate. Indeed, the law specifically provides in paragraph 93 that—

> This section shall not have the effect to release or waive any right of action by the United States, or by the District of Columbia, *or by any person, for any right*, penalty, or forfeiture which may have arisen or which may hereafter arise *under any law of the United States* or any regulation in force in the District of Columbia (Italics ours).

Therefore, to hold that the appellants' rights for relief against unconstitutional restrictions and demands, such as denial of the right to appeal to the courts and to protect themselves against an unjust deprivation of their property, is precluded by the statute in question, is clearly to disregard the provisions of the paragraph just quoted.

To hold otherwise would be to conclude that an unconstitutional order or rate through the medium of a statute of limitations is thereby rendered valid and enforcible because not attacked within the statutory period of 120 days. Or, in other words, a lapse of time prescribed in the statute, and during which no action is taken by the parties affected, renders legal an order or rate invalid from the beginning.

This, however, is contrary to an established principle of law which is, that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed." *Norton* v. *Shelby Co.*, 118 U. S. 425, 442. Therefore, this being true, it is not to be

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presumed that Paragraph 65 of Section 8 of the Public Utilities Act contemplates foreclosing to parties directly affected, a resort to the courts for relief and protection against orders and rates illegal in themselves, as are the orders and rates herein complained of.

*If Paragraph 65 Should be held to Relate to the First Order Made a Basis of Complaint and to Preclude the Assertion of the Appellants' Rights as set out in the Bill, then such Limitation is Unconstitutional and Void.*

As set out in the Bill and as, we submit, conclusively shown herein, appellants, since the date of the first order of the Commission, have been, now are, and until said orders are vacated by a court of competent jurisdiction, will continue to be required to pay a rate that is illegal to the extent that it exceeds the 75 cent rate to private consumers as fixed by the Acts of September 1, 1916. The court of competent jurisdiction is the Supreme Court of the District of Columbia. If as ruled by that court, the statute of limitations prohibits the relief sought as to the first order, appellants have no relief, which is in effect, a denial of a fundamental right guaranteed by the Constitution. A case in point as to the effect of such a statute of limitations is that of *Wight* v. *Police Jury*, 264 Fed. 705, 714.

The opinion is by Circuit Judge Batts, from which we quote rather extensively:

> Fifth Point. Appellant's "fifth point" is to this effect:
>
> "Plaintiff is not estopped or precluded at this time from questioning the validity of the bonds and taxes in question."

In elucidation of this point he makes the following additional proposition:

> "That the limitation of time within which action may be brought under section 17 of Act 256 of 1910, giving to this section its most liberal interpretation, is confined to and relates only to suits contesting the regularity, formality and legality of elections held in pursuance thereof. If, however, the prescription established by said section of said Act be constructed as a bar to fundamental and constitutional objections, it is void and unconstitutional. It is not competent for the legislature to provide that the constitutionality of an act passed by it shall not be contested unless such action be begun within a limited time."

Section 17 of Act 256 of 1910, provides: "That for a period of sixty days from the date of the promulgation of the result of any such election, any person in interest shall have a right to contest the legality of such election for any cause; after which time no one shall have any cause of action to contest the regularity, formality or legality of said election for any cause whatever. If the validity of any election held under the provisions of the Act is not raised within sixty days herein prescribed, then no governing authority of any subdivision herein named, required to levy a tax or issue bonds as authorized at an election or under this Act, shall be permitted to refuse to perform that duty, and urge as an excuse of reason therefor that some provision of the Constitution or law of Louisiana has not been complied with, but it shall be conclusively presumed that every legal requirement has been complied with, and no court shall have authority to inquire into such matters after the lapse of sixty days, as herein provided."

The law of which this is a part, provides for

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the calling of an election, to be held in a prescribed way, at which resident taxpaying voters shall determine whether bonds may be issued for prescribed purposes, in an amount limited by the Constitution. If the election be one called by a body not authorized, to be voted at by persons not authorized, for purposes not authorized, the section would have no application. Assuming the election to be one to which the article applies, a period of sixty days is prescribed after the promulgation of the result, within which any person in interest shall have the right to contest the legality of the election for any cause. It is prescribed that after this time no person shall, for any cause, contest the regularity, formality or legality of the election. It is clearly within the power of the legislature to preclude inquiry into the regularity or formality of the election after a short period of prescription. If by the "legality of the election" is meant anything more than that the election was held in the way prescribed by law, the meaning certainly can not be so extended as to make it the effect of the law that a failure to attack the election would bring about consequences which could not have been accomplished by a valid election. If persons charged with the duty of administering these constitutional provisions, and the legislation enacted in response to them, should disregard the constitutional limitations, failure to attack their action for sixty days could not, ordinarily, be held to give validity to that which would otherwise be void. No act of the legislature can take away from the property owner, whose property is affected, the right to have constitutional burdens measured by the limits of the Constitution. Nor can the legislature compel an officer to do that which is contrary to the Constitution, and, therefore, fundamentally illegal, merely because no one had chosen, within the period of the prescription,

to question the legality of that which had heretofore been done.

* * * * * * * * *

The Supreme Court of Louisiana, in *Crow* v. *Supervisors*, 141 La., 1017, in which the Act under consideration was discussed, used this language:

> "The law-maker has provided a method by which certain public works may be constructed through taxation of property * * * and in so doing has recognized the right of owners * * * to raise all the legal and constitutional objections that they think proper; but it has * * * declared that the right so recognized must be exercised in time and not throughout eternity."

We do not understand that the court intends, by the use of this language, to suggest that constitutional provisions may be disregarded, and that, after the lapse of the short period prescribed by the Act, the result is the same as if the limitations of the Constitution did not exist. The case under consideration called for no such comprehensive statement, and other holdings of the opinion negative such an intention.

The views of the court are doubtless expressed by the opinion in *Daigle* v. *Opelousas G. & N. E. Ry. Co.*, 124 La., 1047. The case was one in which a justice ward, as distinguished from a police jury ward, held an election under Act 202 of 1898, to carry into effect article 270 of the Constitution of 1898. The court held that no election could be legally had in such a subdivision, and used this further language:

"If this conclusion be correct, the police jury of the parish was absolutely without authority to order the election, and the situation is the same as if no election had been held, and prescription

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is not applicable. *Estees* vs. *Board*, 121 La., 991. In *Dimmick* vs. *Opelousas, G. N. & N. E. Ry. Co.*, 123 La., 123, the court drew a clear distinction between a suit contesting an election and a suit to annul a tax voted at a void election. If a void election can not be cured by prescription it can not be cured by the mere inaction of taxpayers."

The opinion in *Crow* vs. *Supervisors*, further, however says:

"And the power of the state to limit the time within which rights, whether derived from constitutions or elsewhere, are to be asserted in her courts, is as well recognized as the rights themselves."

If by this is meant that statutes which are unconstitutional may be enforced, if not attacked within the prescribed periods; or if it be held to mean that officers are under obligations to do things prohibited by the Constitution, if they are not directed by the courts within certain periods to abstain from doing them, the proposition made is not in accord with recognized principles.

*The 90 and 95 Cent Rates are Unreasonable and Unduly Discriminatory in and of Themselves when Considered in Connection with the Rates Charged to the Governments and Others not Private Consumers.*

As bearing on the question of the unreasonableness and the discriminatory nature of the 90 and 95 cent rates to the private consumer, aside from the fact that they are confiscatory (which will be discussed under that heading), attention is called to the great disparity between the Government rate and that paid by private individuals. In the case of *Wilcox* vs. *Consolidated Gas Co.*, 212 U. S. 19, this Court sustained the consti-

tutionality of a statute of New York which made a five-cent lower rate to the City of New York than to the private consumers. In support of the constitutionality of that law it was argued that a discrimination of five cents in favor of the city was not unjustly discriminatory, the city standing in the position of a wholesale consumer or buyer and the cost of supplying the city being less than the cost of supplying other consumers. In sustaining the legality of such discrimination the Court, on page 54 said:

> We see no discrimination which is illegal and for which good reasons could not be given.

So, in the Act of 1916, wherein Congress fixed a temporary rate of 70 cents to the Governments and 75 cents to the private consumers in the District of Columbia, a legislative sanction was thereby placed upon a disparity of five cents in favor of the Governments. We do not insist that it is not possible that after full investigation the Public Utilities Commission would be justified in finding that a disparity even greater than five cents would not be unduly discriminatory. We do insist, however, that the bill alleged facts showing that there was no legal foundation on which to base a finding that the rates to be charged the private consumer in the District of Columbia should exceed the Government rate by as much as 20 or 25 cents per thousand cubic feet.

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*The 90 and 95 cent Rates are Unreasonable and Unduly Discriminatory When Considered in Connection with the Rates Actually Paid for Gas for Municipal Purposes, Park Lamps, and Street Lamps, for the First Nine Months of the Year 1918, Respectively 69.75 cents, 35.85 cents, 40.18 cents, as Alleged in the Bill and Shown in the Plaintiff's Exhibit B. (Rec., p. 14.)*

At these prices paid by the District Government and the prices received for gas used in the United States Government buildings, the average price received for all by the Gas Company for the nine months involved, as shown by the Company itself, was only 52.15 cents per thousand cubic feet. This, of course, is clearly an undue discrimination against the private consumer, and for which no justification was attempted to be made.

*The 90 and 95 cent Rates Prescribed by the Orders of the Public Utilities Commission are Confiscatory, Depriving Appellants of their Property Without Due Process of Law; and Such Orders are Therefore Unconstitutional and Void, and This Regardless of Whether the Commission has Power to Fix Rates to the Governments and All Others Not Private Consumers.*

The Bill alleged facts showing that the basis for the applications for increased rates allowed in Formal Cases Nos. 13 and 70, was that the Gas Company at the existing rates was not able to make expenses and receive a reasonable income on its investment. The opinions of the Commission which constituted a part

of the plaintiff's bill show that it was on this ground that the increased rates were allowed. It was alleged in the bill that the cost of producing gas at the burner for the year 1918, as estimated by the Gas Company, through its counsel, Mr. Minor, at the first hearing on December 18, 1917, would be 79½ cents. It was also alleged that at the hearing on the second application for an increased rate from 90 cents, it was shown to the Commission that if the private consumer had paid 90 cents for the *entire* year 1918, and had the General and District Governments paid the same rate instead of the rate they actually did pay, the Company would have made expenses and received a return of approximately 6 per cent. These facts taken in connection with other allegations in the Bill, particularly those in Paragraph 14, set forth a clear case where the appellants' property, since the effective date of the first order complained of, has been and still is being taken to make up losses accruing to the Gas Company by reason of its furnishing its products to the Government and companies not private consumers, at less than cost of production, and to make up in addition a reasonable profit to the Company on the gas so furnished.

The decision of this Court in *Wilcox* v. *Consolidated Gas Co., supra,* we submit clearly sustains the appellants' contention herein. In that case, the Gas Company objected because a 5-cent lower rate was fixed by statute to the City of New York than was fixed to the private consumer. But this Court said it is not for the Gas Company to complain of the lower rate unless on account of such rate it is on the whole unable to realize a reasonable return on its investment.

In sustaining the constitutionality of the law, it was said:

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> Neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether, by the reduced price to the city, the complainant is upon the whole unable to realize a return sufficient to comply with what it has a right to demand.
> * * *
>
> "We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant."

In the instant case the complainants occupy the position suggested in the *Wilcox Case* in that they *are* the consumers and are put in the position that by reason of the reduced price to the city and others not private consumers, they are required to make up the loss the company thereby sustains and also a reasonable profit on the amount so furnished.

Question was made at argument before the Court of Appeals as to whether a different rule might not apply in the instant case from that held to apply in the *Wilcox Case* by reason of the fact that in the latter case the suggested confiscation or taking of property without due process, arose under an act of the State Legislature, while in the case at bar it arises under an act of Congress. The only difference is that the *Wilcox Case* involved the Fourteenth Amendment to the Constitution and the case at bar involves the Fifth Amendment, the rule as to due process being the same. In the Case of *Wilson* v. *New*, 243 U. S. 332, 376, this Court, in considering the Act of Congress of September 3, 5, 1916 (39 Stat. 721), said:

> And though it is a regulation of commerce, it is void if it conflicts with the provisions of the Fifth Amendment, that no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynch*, 188 U. S. 445, 471; *Adair* v. *United States*, 208 U. S. 161, 180; *United States* v. *Cress*, 243 U. S. 316.

It was also suggested in the Court of Appeals that the orders made the basis of complaint in appellants' bill do not effect a confiscation because the complainants are not compelled to use gas. The answer to this is well stated in the words of this Court in the *Wilcox Case, supra, p.* 52:

> The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the "old stand," because he can not get gas anywhere else.

Judicial notice may be taken of facts of such common knowledge that in the District of Columbia there is only one source of gas supply, and that unless the private consumer sees fit to pay the price fixed by the Utilities Commission and charged by the Gas Company, his supply of a necessary product will be cut off. Judicial notice may also be taken of the additional fact that unless that product is obtainable, the value of appellant's property and business in the District will depreciate and the cost of equipping their buildings with gas appliances and fixtures will be a total loss.

As to whether such a condition would not amount to

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confiscation the attention of the Court is called to the case of *Hooker* v. *Interstate Commerce Commission*, 188 Fed., 242, 248, wherein the Commerce Court in considering a similar question involving an alleged confiscatory railroad rate fixed by the Interstate Commerce Commission, said:

> Second. Is it shown beyond reasonable question, by the present record that the schedule of rates contained in the order of the Commission complained of clearly violates the Fifth Amendment to the Constitution of the United States by taking the property of the petitioners without due process of law or without just compensation if the taking is for a public purpose?
>
> It seems to have been decided in the case of *Board of Railroad Commissioners, etc.* v. *Symms Grocery Co. et al.*, 53 Kan. 207, 35 Pac. 217, that the shipper can not invoke these constitutional provisions for the reason that he is not obliged to ship; that he may utilize the rate prescribed or not. We are not impressed with the soundness of this decision. The logical result of such a holding as applied to the facts in the present case would be equivalent to saying to the shipper, "You may pay an unconstitutional rate or go out of business;" and we do not think that the protection of the Constitution is held on any such condition.

It is therefore submitted that the rates fixed in the orders, Nos. 254 and 314, are confiscatory and that the orders of the Utilities Commission prescribing such rates are unconstitutional and void.

that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' *Tang Tun* v. *Edsell*, 223 U. S. 673, 681: *Chin Yoh* v. *United States*, 208 U. S. 8, 13; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468; *Zakonaite* v. *Wolf*, 226 U. S. 272; or, if the facts found do not, as a matter of law, support the order made. *United States* v. *B. & O. S. W. R. R.*, 226 U. S., 14; *A. C. L.* v. *N. C. Corp. Com*, 206 U. S. 1, 20."

It is therefore submitted that the failure of the Utilities Commission to give the statutory notice as alleged in the Bill rendered the order made in pursuance of the nearings on the application for the second rate increase, null and void. See also *Wilmington City Ry. Co. et al.*, v. *Taylor et al., Board of Public Utilities Commissioners of City of Wilmington*, 198 Fed., 159

WHEREFORE, it is respectfully submitted that for the reasons assigned the orders of the Utilities Commission prescribing the 90 and 95 cent rates for gas furnished private consumers, are void; that the only legal rate to be charged the private consumer of gas in the District of Columbia is the statutory rate of 75 cents per thousand cubic feet; that plaintiffs are entitled to a refund of all amounts paid above said statutory rate to date; that plaintiffs' bill stated facts sustaining their rights to such relief from the Supreme Court of the District of Columbia and to a decree from that court setting aside said orders, and that the Court of Appeals erred in affirming the decree of the Supreme Court of the District dismissing appellants' bill.

Respectfully,

ROSCOE F. WALTER,
*Attorney for Appellants.*

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